United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1318

To be argued by
HERMAN KAUFMAN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

RICARDO INNISS and
GERTRUDE McLENAN,

Defendants-Appellants.

BRIEF FOR APPELLANT GERTRUDE McLENAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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STATEMENT

Gertrude McLenan appeals from a judgment of the United States District Court for the Eastern District of New York, rendered by Judge Orrin Judd on August 1, 1975. The decision is not reported.

McLenan was convicted, pursuant to Title 21, United States Code, Section 846, of a conspiracy to import into the United States and to possess with intent to distribute various quantities of narcotic drug controlled substances. McLenan was also convicted pursuant to Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2, of possession with intent

to distribute these substances and, pursuant to Title 21, Sections 952(a), and 960(a)(1) and Title 18, United States Code, Section 2 of importing these substances into the United States.

McLenan received a sentence of eight years on each count, to be followed by five years special parole, the sentence on each count to be concurrent.

QUESTIONS PRESENTED

1. Whether proof of Gertrude McLenan's alleged participation, prior to the conspiracy charged in the indictment, in certain narcotic violations, unrelated to the charges below, deprived her of a fair trial.

2. Whether prejudice resulted from the Government's attempt, during closing arguments to the jury, to bolster the testimony of the Government's main witness, a co-conspirator, by suggesting to the jury that a statement taken from the witness, which was not in evidence, was consistent with the witness's trial testimony.

3. Whether appellant was prejudiced by the testimony of a Government witness in rebuttal, called merely to impeach appellant with respect to collateral matters raised during the cross-examination of appellant.

4. Whether prejudice resulted from the Government's suggestion that one of its witnesses had refused to testify on account of threats, which were not shown to have been made by the appellant.

5. Whether prejudice resulted from the Government's suggestion that appellant was under a duty to subpoena a witness for the purpose of corroborating appellant's testimony.

STATEMENT OF THE CASE

In a five count indictment filed on December 1, 1974 in the United States District Court for the Eastern District of New York (74 Cr. 791; A 6-8*) the defendant-appellant, Gertrude McLenan, and two other persons - Ricardo Inniss and Roberto Alvarez -- were charged with a conspiracy to violate the federal narcotics laws and various substantive counts. The conspiracy count charged that the defendants conspired to violate 21 U.S.C. §§ 841(a)(1), 952(a) and 960(a)(1). It was alleged to be part of the conspiracy that the defendants would import into the United States and possess with intent to distribute various quantities of cocaine. Counts two and four charged Roberto Alvarez with the distribution of cocaine with the knowledge that it had been illegally imported into the United States. Gertrude McLenan and Mercado Inniss were charged in count three with possession with intent to distribute cocaine, and McLenan was also charged in count five with importing cocaine into the United States from Panama.

The trial of Ricardo Inniss and the defendant-appellant Gertrude McLenan commenced before Judge Judd and a jury on July 7, 1975.

The Government's proof at trial primarily consisted of the testimony of Manuela Cortes-Canate, a Panamanian, who was named as a co-conspirator in the indictment (Tr. 45). Cortes-Canate

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*References preceded by "A" are to the pages of the appendix filed by appellant Gertrude McLenan. References preceded by "Tr." are to the pages of the transcript of the trial.

testified that, while in Colon, Panama in February or March, 1974, she met Gertrude McLenan, an acquaintance of hers for the last twenty years. They met the next day with Ricardo Inniss at a hotel in Panama City, and Cortes-Canate was asked if she would go to Columbia "to carry some cocaine." Cortes-Canate agreed and was thereafter informed by her cousin, Marie Fernandez, another co-conspirator, who Cortes-Canate had asked to find a source for the drugs, that the cocaine could be purchased in Columbia from the defendant Roberto Alvanrz (Tr. 54-7).

Cortes-Canate, Inniss, McLenan and Cecelia de Leon flew to Columbia and took a bus from the City of Barranquilla to Cartagena, where Fernandez put Cortes-Canate into touch with Roberto Alvarez. Alvarez, after assuring Cortes-Canate that he could obtain cocaine in Columbia, the same day brought a sample of the drug to the hotel, where the four visitors were staying; the sample was tested by Inniss, who said that he "liked" it, and Alvarez returned to the hotel the next day with a larger quantity, which Cortes-Canate and de Leon sewed into Cortes-Canate's handbag (Tr. 60-7, 180-1).

After obtaining Mexican visas, Cortes-Canate, Inniss, McLenan and de Leon purchased plane tickets, paid for by McLenan, and flew to Mexico City, where they took a bus to Tiajuana. Cortes-Canate and de Leon, who did not have visas to enter the United States, were taken across the border illegally and were thereafter met by Inniss and McLenan, who had entered the United

States together, at the El Toreador Hotel near San Diego. The next day, Inniss flew back to Panama and Cortes-Canate, McLenan and de Leon flew to New York (Tr. 72, 76-7, 80-2, 82-3).

A week later, Inniss arrived at McLenan's home and Cortes-Canate gave him the cocaine, which Inniss arranged to have converted into smaller packages, which he eventually sold to various street customers (Tr. 84-7, 91-5).

Cortes-Canate further testified that in the following April, McLenan received a letter that her mother was ill and decided to return to Panama. Cortes-Canate, who agreed to accompany McLenan on the trip, did not have an American passport -- she had entered the country illegally -- so Inniss obtained a birth certificate for her belonging to one Joanna Perez. In May, after purchasing plane tickets, McLenan and Cortes-Canate, who was traveling under the name of Joanna Perez, flew to Panama and contacted Cortes-Canate's cousin Marie Fernandez, who agreed to travel with Cortes-Canate to Columbia to purchase cocaine, while McLenan remained in Panama with her mother. Cortes-Canate and Fernandez traveled to Cartagena and purchased one kilogram of cocaine from Roberto Alvarez with money Fernandez had been given by McLenan. Cortes-Canate sewed the drugs into her handbag and returned to Panama, from where she and McLenan later flew to the United States by way of Mexico, landing at John F. Kennedy International Airport on June 1. Cortes-Canate was arrested when the handbag containing the cocaine was discovered by a customs official during a search of her luggage (Tr. 105-9, 115-25, 134, 181-2).

Cortes-Canate was thereafter consulted by an attorney, Ira London, who told her that he had been retained to represent her by her family and friends; London also indicated that his retainer for representing Cortes-Canate had been paid by Gertrude McLenan (Tr. 135-6).

Cortes-Canate eventually pleaded guilty to possessing cocaine, a crime which carries a sentence of up to fifteen years in jail. She received no promises in return for the plea, but was informed by the Government that her cooperation in the instant case would be made known to the judge at the time of sentence. She received a term of fifteen months plus an assurance that she would be permitted to return to Panama after the sentence was completed (Tr. 138-9).

The remainder of the Government's proof included the testimony of the chemist who analyzed the drugs seized from Cortes-Canate; a Drug Enforcement Agent, who testified to the drug's value, and the customs officer, who actually discovered the cocaine in Cortes-Canate's luggage. The manager employed at the Toreador Hotel on the date the defendants and Cortes-Canate and Cecelia de Leon checked into the hotel also testified. Additionally, certain witnesses were called by the Government to lay a technical foundation for the receipt of certain documentary evidence offered to corroborate Cortes-Canate's testimony. These documents included certain airline records of the defendants' air travel, as testified to by Cortes-Canate, and bank records showing that Gertrude McLenan had withdrawn

$12,000 from her bank account in February, 1974 and deposited $7,000 in the account the following April. See Exhibits 13-15, 23-27, 38-44. Also introduced were two sets of round trip airline tickets, purchased by Gertrude McLenan in her own name and in the name of Joanna Perez, from a travel agent in Brooklyn on May 25, 1974. See Exhibits 33-37.

Gertrude McLenan, a native Panamanian, who is now an American citizen, testified as a witness in her own behalf, denying the charges contained in the indictment. A seaman, who has worked as a waitress, cook and baker on ocean going vessels since 1964, McLenan testified that she went to Panama in February, 1974 to visit her parents; in Panama she met Cortes-Canate, who told the defendant that she thought she could get into the United States illegally (Tr. 427-30, 439-43, 542).

McLenan, Cortes-Canate and their two friends, Ricardo Inniss and Cecelia de Leon, who were also in Panama during this period, took a vacation trip together, traveling to Columbia and Mexico before returning to the United States, where they stopped briefly at a hotel near San Diego, California. McLenan was unaware that Cortes-Canate was transporting narcotics from Columbia to the United States (Tr. 467-72, 478, 481, 554, 577).

Following her arrival in New York, McLenan advised Cortes-Canate how she might possibly find employment in the United States and then left the country to work on a ship, the Export Ambassador (Tr. 482). While the ship was docked in Greece, McLenan

learned that her mother, who is living in Panama, was ill and returned to the United States, where she arranged to fly to Panama with Cortes-Canate, who had instructed McLenan to buy a ticket for her under the name of Joanna Perez (Tr. 482-5, 582). Upon her arrival in Panama, McLenan learned that her mother was feeling better and decided to take a sightseeing trip with Cortes-Canate to Mexico before returning to the United States (Tr. 490-2, 583).

McLenan later heard that Cortes-Canate had been arrested in this country, but she did not know what the arrest was for. Shortly thereafter, the defendant was contacted by Cortes-Canate's sister, who, complaining that she had not heard from Cortes-Canate, asked McLenan to retain counsel for her; McLenan subsequently hired Ira London, Esq. (Tr. 497, 586- 7).

As part of her defense, McLenan also called Ira London, an attorney practicing criminal law in New York. London testified that he was retained to represent Cortes-Canate by McLenan, who, London subsequently learned from his client, was in no way involved with the charges here. Mr. London was informed by Cortes-Canate that the other culprits in the case were Luisa and Carlos Morales, who were to receive the cocaine Cortes-Canate had brought into the United States (Tr. 622-4, 629-30).

As part of its rebuttal, the Government called Doug Welch, who testified that he had purchased cocaine on "credit" from Gertrude McLenan and Ricardo Inniss outside McLenan's house in 1973;

these drug purchases predated the conspiracy charged in the indictment. Welch also purchased drugs from McLenan in March and April, 1974 (Tr. 675-83, 691). In February, 1974, Welch, then in Panama, was asked by McLenan how to transport "some people across the border." Welch advised her to go to a billiard room in Tiajuana for help (Tr. 684-5).

POINT I

PROOF THAT GERTRUDE McLENAN ENGAGED IN SALES OF COCAINE, UNRELATED TO AND OCCURRING NEARLY ONE YEAR PRIOR TO THE CONSPIRACY CHARGED, RESULTED IN THE DENIAL OF HER RIGHT TO A FAIR TRIAL.

Gertrude McLenan, 46, a native Panamanian, who is now an American citizen, was convicted after a jury trial of conspiring to violate the federal narcotics laws and related substantive offenses, and was sentenced to a term of eight years, to be followed by five years special parole. Her principal claim on this appeal is that she was denied her right to a fair trial, owing to the erroneous introduction of proof that she engaged in several sales of cocaine, all unrelated to the charges, and which predated the conspiracy alleged in the indictment by almost one year. This evidence was received on the Government's rebuttal through the testimony of Doug Welch, whose identity, it appears, was made known to the defense the day before the witness was called to testify. Compare United States v. Baum, 482 F. 2d 1325, 1331 (2d Cir. 1973); United States v. Leonard, 524 F. 2d 1076, 1091-2 (2d Cir. 1975). Welch testified that, in the summer of 1973, he made several "street" purchases of cocaine from Gertrude McLenan. Welch frequently received the cocaine on credit, and it was his usual practice to make payment for the drugs to either McLenan or Ricardo Inniss. This evidence, to which the defense objected, should not have been heard by the jury.

Language from previous decisions of this court suggests that the "similar acts" rule should be interpreted in a very broad manner, leaving it to the discretion of the trial judge to determine whether such proof can be fairly received at trial. See. e.g., United States v. Brettholz, 485 F.2d 483, 487 (2d Cir. 1973), cert. denied, 415 U.S. 976 (1974). The court's recent decisions, however, indicate a retrenchment from this position, and it now appears that proof of uncharged offenses is admissible if "it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." United States v. Chestnut, ___ F. 2d ___ slip op. 2439, 2455 (2d Cir. 1976); United States v. Leonard, supra at 1091, United States v. Gerry, 515 F. 2d 130, 141 (2d Cir. 1975); United States v. Deaton, 381 F. 2d 114, 117 (2d Cir. 1967); United States v. Seeman, 115 F. 2d 371, 373 (2d Cir. 1940). However, "[e]vidence of prior crimes is customarily not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged." United States v. DeCicco, 435 F. 2d 478, 483 (2d Cir. 1970). Yet, this is precisely what occurred here.

First, the uncharged offenses here were not "closely related in both subject matter and manner to the crime charged in the indictment." United States v. Chestnut, supra at 2455. "[T]he existence of a close parallel between the crime charged and the acts shown" were simply not established in this case. Ibid.

Whereas Welch testified to purchasing cocaine on the street from McLenan, the indictment alleged that McLenan was part of an elaborate scheme to import cocaine into the United States from Columbia, by way of Mexico. There was no meaningful relationship between these crimes. Nor did these allegedly "similar acts" occur "in close temporal proximity. . . " Ibid. Welch's pre-indictment purchases of cocaine from McLenan in 1973 occurred several months before appellant took her first trip to Panama for the alleged purpose of bringing cocaine back into the United States. See United States v. Mallah, 503 F. 2d 971, 981 (2d Cir. 1974), cert. denied, 43 L.Ed.2d 671 (1975) ("similar act" offered by the Government occurred six days after the crime charged). Welch's testimony, therefore, had no probative value since this proof did not entitle the jury to draw any inferences about McLenan's alleged participation in the importation scheme charged in the indictment. The 1973 cocaine sales succeeded merely in showing the jury that McLenan was dealing in this drug on a continual basis. Compare F. R. Evid. 404(b). This was not, of course, a proper evidentiary basis upon which to receive this testimony.

Nor, contrary to the Government's argument below, were the uncharged drug sales relevant to show the appellant's "knowledge and intent" to commit the crimes charged. No question was even raised in this case about the intent or knowledge with which McLenan may have acted. Cortes-Canate testified in substance that

McLenan and Inniss engaged her to go to Panama with them for the purpose of setting up a purchase of cocaine to be brought back to the United States. McLenan, though conceding that she accompanied Cortes-Canate on two trips to Panama and Columbia, denied that any purchases of any drugs were transacted on these trips. The question thus faced by the jury was one of credibility only -- whether Cortes-Canate or McLenan was telling the truth. If the jury believed Cortes-Canate, McLenan's guilt would indisputably follow, for Cortes-Canate's testimony established the commission of an unequivocal act requiring no further proof to show that the act was committed intentionally.

Too, this is not a case where the nature of the crime charged -- for example fraud -- raised any uncertainty about McLenan's state of mind. Compare United States v. Coblentz, 453 F. 2d 503, 505 (2d Cir.), cert. denied, 406 U.S. 917 (1972). Nor did McLenan raise the defense, for example, that she was unaware that the package sewn into Cortes-Canate's handbag contained cocaine, a claim which would have clearly put her intent and knowledge in dispute. Compare United States v. Chestnut, supra. The defense in this case was simply that McLenan denied committing the acts altogether. See United States v. DeCicco, supra.

In United States v. DeCicco, this court ruled that it was improper for the Government to offer proof of "similar acts" because the defendant's culpability for the crime charged had

never been put in issue at the trial. The defendant, who had been implicated by one Parness, an accomplice, in transporting stolen art goods, sought to defend the charges by mounting a credibility attack upon the Government's main witness. Notably, however, the defendant did not argue that he was ignorant that the goods, which he allegedly transported, were stolen. The question of the defendant's intent or knowledge was simply not in the case. Accordingly, this court saw no point in the introduction of prior uncharged crimes, linking the defendant to the sale of stolen paintings to an insurance company. "[W]hatever probative value the prior crimes of DeCicco and Gregory Parness added to the prosecution's case on the issue of defendants' intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants, at least defendants DeCicco and Gregory Parness, were a continuing band of art treasure thieves and 'fencers.'" United States v. DeCicco, supra at 484; compare People v. McKinney, 24 N.Y. 2d 180 (1969).

Clearly distinguishable from DeCicco and the facts of the present case are cases like United States v. Chestnut, supra, where the defendant denied any "awareness of wrongdoing." United States v. Chestnut, supra at 2443. The defendant, who was in charge of a staff managing the campaign of a senatorial candidate, had been charged with causing the candidate to receive illegal corporate campaign contributions. While conceding that the

candidate actually received such illegal campaign contributions, a fact established by documentary evidence, the defendant denied knowing that these contributions had been made, claiming that the contributions had been accepted and forwarded to the candidate by other members of the defendant's office staff. Unlike the situation here, since Chestnut placed his intent and knowledge in issue, it was therefore open to the Government to show that on other occasions, the defendant had personally received and forwarded to his candidate other similar campaign contributions.

While, undeniably, the court, in its recent decisions, has adopted a flexible policy toward the admission of uncharged crimes, the limits of this rule were clearly stretched in the present case. There was simply no need for the Government to dredge up evidence of Gertrude McLenan's previous cocaine sales in order to make out its case. The proof did no more than mark Miss McLenan as a cocaine dealer, which unjustifiably prejudiced the jury's determination of the material issues at the trial.

Beyond this, evidence of the pre-conspiracy cocaine sales should have been excluded from the jury's consideration for another reason. This proof, along with the other facts elicited during Welch's rebuttal testimony, was offered solely to impeach Miss McLenan with respect to collateral matters, covered for the first time during the Government's cross-examination of the appellant. It is not proper to call a witness on rebuttal for this purpose. United States v. Beno, 324 F. 2d 582, 585, 588

(2d Cir. 1963) cert. denied 379 U.S. 880 (1964); United States v. Jansen, 475 F. 2d 312 (7th Cir.), cert. denied 414 U.S. 826 (1973); 3 A Wigmore, Evidence §1007 (Chadbourn Rev. 1970). The "similar acts" testimony therefore resulted in double prejudice to appellant; in addition to being an uncharged crime it was improper impeachment on a collateral matter.

Miss McLenan was questioned for the first time about her association with Doug Welch during the Government's cross-examination of appellant. McLenan testified that she knew "of" Welch but not "about him." (Tr. 531). She further testified that she was not friendly with Welch and that she had only seen him in Panama and in various bars in New York (Tr. 532-6). Clearly, McLenan's association with Welch was not a relevant fact in the case at the time this line of inquiry was pursued by the Assistant United States Attorney. Realizing this, defense counsel objected to the testimony on the ground that the Government was attempting merely to set up a "straw man," which would then be knocked down when Welch was brought in to court to testify (Tr. 533-6). This is precisely what happened, and it was improper for the Government to utilize a rebuttal witness for the purpose of impeaching the defendant with respect to such irrelevant matters.

Thus, what happened in the present case went considerably beyond the permissible practice of allowing the Government to offer evidence on rebuttal which might have been earlier elicited during the Government's case in chief. See United States v. Trapnell, 495 F. 2d 22 (2d Cir.), cert. denied, 419 U.S. 851 (1974);

United States v. Lieblich, 246 F. 2d 890 (2d Cir.), cert. denied, 355 U.S. 896 (1957); compare People v. Coles, 47 A.D. 2d 905 (2d Dept 1975). In the two federal cases cited, the court ruled that it was proper to permit the Government to offer evidence on rebuttal for the purpose of corroborating the main witness's testimony, which had been the subject of attempted impeachment by the defense. This was not why Welch was called as a rebuttal witness in the present case. And, though Welch did testify to matters that were cumulative to the Government's case in chief, there was no reason why he could not have been called when the Government presented its main proof. The Government explained that Welch's trial appearance was delayed because the witness had been threatened not to testify (Tr. 534). It appears, however, that the Government decided at the outset of these proceedings to wait to call Welch until the defense had rested. Although Welch's identity and whereabouts were known to the Government well in advance of the trial, no attempt was made to contact Welch about testifying in this case until the trial was already underway (Tr. 534). It may be presumed that if the Government had actually intended to have Welch testify during the presentation of the main case, he would have been notified about his appearance in court before the trial actually began.

In sum, the use of uncharged drug sales to show that Miss McLenan carried on a life of crime and to impeach her credibility with respect to collateral matters resulted in a denial of her right to a fair trial.

POINT II

THE GOVERNMENT'S CLOSING ARGUMENT TO THE JURY DENIED APPELLANT A FAIR TRIAL.

Miss McLenan also argues that various portions of the Government's summation require that appellant receive a new trial. Initially, improper reference was made to an out of court fifteen-paragraph debriefing statement taken from Cortes-Canate by Drug Enforcement Agent Featherly for the purpose of bolstering Cortes-Canate's trial testimony. The practice of calling the Jury's attention to matters not in evidence was recently condemned by this court in United States v. Burse, ___ F. 2d ___ slip op. 2507, 2512 (2d Cir. 1976)

Although initially received in evidence (Tr. 364; Exhibit 17), the debriefing statement was never revealed to the jury. After lengthy discussions about the matter, Judge Judd ruled that it would be proper for the jury to be informed only of the three paragraphs (Nos. 3, 4, and 9), in the statement that had been utilized by the defense during the cross-examination of Cortes-Canate. The remaining twelve paragraphs were withheld from the jury's consideration (Tr. 1113). When the jury asked to see the entire debriefing statement during deliberations, the court indicated that the statement was not being offered because it had not been made under oath (Tr. 1109-10).

Despite the court's ruling that the jury would not be permitted to see the debriefing statement at the end of the trial, the Assistant United States Attorney made the following comment about the statement during his summation:

> Now, also you will recall during the cross-examination of Manuela Cortez-Cunate Mr. Handman referring to a five-page report on the debriefing of Manuela Cortez-Cunate picked about two sentences out of a five-page report, single spaced.
>
> Now I ask you, if this story was concocted, if what she told you was concocted don't you think that there would have been a lot of more discrepancies in this report than two sentences?
>
> MR. HANDMAN [defense counsel]: Your Honor, I object to that conclusion just because questions --I think it's unfair.
>
> THE COURT: It's not a conclusion. It is an inference he is putting to the jury and the jury can draw opposing inferences also as I will tell them when we get to the question of instructions. (Tr. 1039).

Undeniably, the jury had no right to draw any inference from a document that was not before them. It was simply unfair for the Government to suggest to the jury that since the defense had cross-examined Cortes-Canate only about two sentences out of the five page debriefing report, the remainder of the report was therefore corroborative of her trial testimony. The major issue to be decided by the jury in this case was the credibility of Cortes-Canate, and the resolution of this issue was influenced by the Government's improper maneuver.

It may be also noted that, except for the three paragraphs of the report used by the defense to cross-examine Cortes-Canate, the debriefing statement was inadmissible. During the trial, Judge Judd suggested that the debriefing was admissible under the recent fabrication rule. Judge Judd was wrong. Under the

recent fabrication rule, a prior consistent statement is admissible to rebut a claim that a witness's story about the crime was fabricated, so long as the statement was made before the motive to fabricate arose. See, e.g., United States v. Zito, 467 F. 2, 1401, 1403 (2d Cir. 1972). In the present case, however, the debriefing statement was taken after the asserted motive to fabricate existed. The defense argued that Cortes-Canate's motive to fabricate developed after she had been told by the Government that her cooperation in the present case would be pointed out to the court at the time she was sentenced on her plea of guilty and that she would be permitted to return to Panama after her sentence was completed. The parties reached this understanding in August, 1974, and the debriefing statement was not taken from Cortes-Canate until the following December. The debriefing statement, since taken after the motive to fabricate arose, was therefore not admissible under the recent fabrication rule. Nor was there any other basis for its admissibility.

Error also resulted when the Assistant United States Attorney mentioned that Doug Welch had been reluctant to testify on account of threats communicated to the witness, apparently by certain members in the audience during the trial:

> Now let's look at Doug Welch. Doug Welch is a criminal. Doug Welch, as defense counsel said, has committed many crimes. No question about that.
>
> Ask yourselves, was Doug Welch a reluctant witness? He had to be arrested as a material witness.

MR. PREMINGER [attorney for Inniss]: I object to that. That's not in evidence.

THE COURT: Yes. I think it was brought out.

MR DE PETRIS [Assistant United States Attorney]: Yes, it was.

THE COURT: Yes.

MR. DE PETRIS: He had to be arrested as a material witness. And he was ordered to testify under a grant of immunity by this court. He didn't want to testify.

And you can also think about all the people who were in the courtroom when he did testify that day.

Now I ask you, he came in here and testified and what he told you he didn't want to say in this courtroom. But he was telling you the truth as best he could remember it. He was telling you about his dealings with Ricardo Inness and Gertrude McLenan. He told you he is out on bail as a material witness. He told you that he is out in the street and he didn't want to come in here and testify because he has to go back out on the street. But he was ordered to do so (Tr. 1049-50).

Assuming that Mr. Welch actually received threats of reprisals in the event he decided to testify in the present case, all comment about this subject should have been precluded. As conceded by the Government, Miss McLenan never attempted in any way to prevent Welch from testifying. Yet the risk that the jury, after hearing from the Government that Welch had actually been threatened, might infer that appellant was behind the efforts to intimidate the witness, is clear. The prejudice thus flowing from the Government's remarks about the threats to Welch, therefore, cannot be condoned. Compare United States v. DeCicco, 435 F. 2d 478, 483-6 (2d Cir. 1970).

Finally, it was improper for the Government to tell the jury to draw an adverse inference from Miss McLenan's failure to subpoena a witness to provide corroboration for her own testimony. Miss McLenan was questioned on direct examination about her bank withdrawals and deposits, a subject first raised by the Government. The Government proved that despite her relatively small income, Miss McLenan withdrew about $12,000 from her account in February, 1974 and then deposited approximately another $7,000 in the same account the following April. See Exhibits 38-44. To rebut the inference that these sums had been obtained from the purchase and sale of cocaine, Miss McLenan testified that the money she withdrew from her account was loaned to one Besinford, who soon thereafter made partial repayment, which was then redeposited into appellant's account (Tr. 459-60).

During summation, the Government argued:

> Now, she said that she worked at the Baby Grand. She said that a man by the name of Besinford, or something like that, she loaned him $7,000 or $7,500 in February of 1974, just three days before she went on her first trip. She was employed by him and she loaned him $7,000.
>
> Now I ask you -- well, of course, you can question how close an association there must be between these two people if you believe her testimony that she loaned $7,000 to him. But then ask yourselves this -- and, of course, both sides have the right of subpoena. A witness may be equally available to both sides.
>
> But ask yourselves this question. Consider the association that Gertrude McLenan must have had with this man, Mr. Besinford.
>
> Did you see that man come in here and testify that he received the $7,000 loan?

MR. PREMINGER: I object to that. I don't believe that collateral issue would be entertained in this court.

THE COURT: I thought you were representing Mr. Inness.

MR. PREMINGER: It makes no difference. It is a summation connecting both of them.

THE COURT: Yes, of course. No defendant has any obligation to produce any witnesses.

MR. DE PETRIS: I understand that.

THE COURT: The jury will have that in mind.

MR. HANDMAN: And any witness is equally -- as Mr. DePetris said -- subject to be subpoenaed by the Government to come in and testify by the defendant and the Government.

MR. DE PETRIS: I understand that.

Now you think of the association there must be between Gertrude McLenan and this man. And even though the defense has no obligation to call any witnesses, and I ask you if there had been a loan don't you think that that witness would have been here?

MR. HANDMAN: Again, your Honor, if there had not been a loan wouldn't the Government call this man?

MR. DE PETRIS: If we could find him (Tr. 1041-2).

The Government's remarks were clearly inappropriate, since it was never shown that Besinford was not equally available as a witness to both sides. The suggestion that Miss McLenan had greater access to the witness and that her lawyer would have subpoenaed him to testify about the loan transaction, had the loan actually been made, is thus incorrect. The remark therefore constituted improper comment about appellant's failure to offer proof about a

point in the case, even though, as underscored by defense counsel, a defendant in a criminal action is never under a burden to call a witness to testify for the defense.

In sum, the foregoing errors committed during the Government's summation require that appellant receive a new trial.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

HERMAN KAUFMAN
Attorney for Appellant
Gertrude McLenan

LITMAN, FRIEDMAN & KAUFMAN
LEWIS R. FRIEDMAN
of counsel

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HERMAN KAUFMAN, being duly sworn, deposes and says: deponent is not a party to the action, is over eighteen years of age and has his office at 120 Broadway, New York, New York. On March 31, 1976 deponent served two copies each of the within brief and appendix filed in behalf of appellant Gertrude McLenan upon:

The Honorable David G. Trager
United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Marvin Preminger, Esq.
Preminger, Meyer & Light
66 Court Street
Brooklyn, New York 11201

the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Herman Kaufman

Sworn to before me this
31st day of March, 1976

Margaret L. Eirman

MARGARET L. EIRMAN
Notary Public, State of New York
No. 24-4606127
Qualified in Kings County
Commission Expires March 30, 1977